

# SUPREME COURT OF WISCONSIN

## NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 03-06

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In the matter of the repeal of Wis. Stat. § 802.05, and Wis. Stat. § 814.025, and the adoption of Rule 11 of the Federal Rules of Civil Procedure in lieu thereof as amended Wis. Stat. § 802.05

**FILED**

**JUN 21, 2005**

Cornelia G. Clark  
Clerk of Supreme Court  
Madison, WI

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By order dated March 31, 2005, a majority of the court adopted a petition filed by the American Board of Trial Advocates (ABOTA), Wisconsin Chapter; the Civil Trial Counsel of Wisconsin (CTCW); the Wisconsin Academy of Trial Lawyers (WATL); and the Litigation Section of the State Bar of Wisconsin, seeking repeal of Wis. Stat. § 802.05, and Wis. Stat. § 814.025, and the adoption of the 1993 amendments to Rule 11 of the Federal Rules of Civil Procedure in lieu thereof as amended Wis. Stat. § 802.05.

The court now issues this supplemental order, effective July 1, 2005, as follows:

**Section 1.** 230.85 (3) (b) of the statutes is amended to read:

230.85 (3) (b) If, after hearing, the division of equal rights finds that the respondent did not engage in or threaten a retaliatory action it shall order the complaint dismissed. The division of equal rights shall order the employee's appointing authority to insert a copy of the findings and orders into the employee's personnel file and, if the respondent is a natural person, order the respondent's appointing authority to insert such a copy into the respondent's personnel file. If the division of equal rights finds by unanimous vote that the employee filed a frivolous complaint it may order payment of the respondent's reasonable actual attorney fees and actual costs. Payment may be assessed against either the employee or the employee's attorney, or assessed so that the employee and the employee's attorney each pay a portion. To find a complaint frivolous the division of equal rights must find that ~~either s. 814.025 (3) (a) or (b) applies or that both s. 814.025 (3) (a) and (b) apply~~ s. 802.05 (2) has been violated.

NOTE: Amends cross-reference in accordance with the repeal and recreation of s. 802.05 by S. Ct. Order 03-06.

**Section 2.** 767.293 (6) of the statutes is amended to read:

767.293 (6) Section ~~814.025~~ 802.05 (2) applies to the filing of an affidavit under this section.

NOTE: Amends cross-reference in accordance with the repeal and recreation of s. 802.05 by S. Ct. Order 03-06.

**Section 3.** 801.02 (7) (d) of the statutes is amended to read:

801.02 (7) (d) If the prisoner seeks leave to proceed without giving security for costs or without the payment of any service or fee under s. 814.29, the court shall dismiss any action or special proceeding, including a petition for a common law writ of certiorari, commenced by any prisoner if that prisoner has, on 3 or more prior occasions, while he or she was incarcerated, imprisoned, confined or detained in a jail or prison, brought an appeal, writ of error, action or special proceeding, including a petition for a common law writ of certiorari, that was dismissed by a state or federal court for any of the reasons listed in s. 802.05 ~~(3)~~ (4) (b) 1. to 4. The court may permit a prisoner to commence the action or special proceeding, notwithstanding this paragraph, if the court determines that the prisoner is in imminent danger of serious physical injury.

NOTE: Amends cross-reference in accordance with the repeal and recreation of s. 802.05 by S. Ct. Order 03-06, which moves provisions relating to prisoner litigation from s. 802.05 (3) to s. 802.05 (4).

**Section 4.** 802.05 (4) (b) 1. of the statutes is amended to read:

802.05 (4) (b) 1. The action or proceeding is frivolous, as determined ~~under sub. (b)~~ by a violation of sub. (2).

NOTE: Corrects technical error in S. Ct. Order 03-06.

**Section 5.** 802.06 (1) of the statutes is amended to read:

802.06 (1) When presented. Except as provided in sub. (1m) or when a court dismisses an action or special proceeding under

s. 802.05 ~~(3)~~ (4), a defendant shall serve an answer within 45 days after the service of the complaint upon the defendant. Except as provided in sub. (1m), if a guardian ad litem is appointed for a defendant, the guardian ad litem shall have 45 days after appointment to serve the answer. A party served with a pleading stating a cross-claim against the party shall serve an answer thereto within 45 days after the service upon the party. The plaintiff shall serve a reply to a counterclaim in the answer within 45 days after service of the answer. The state or an agency of the state or an officer, employee or agent of the state shall serve an answer to the complaint or to a cross-claim or a reply to a counterclaim within 45 days after service of the pleading in which the claim is asserted. If any pleading is ordered by the court, it shall be served within 45 days after service of the order, unless the order otherwise directs. The service of a motion permitted under sub. (2) alters these periods of time as follows, unless a different time is fixed by order of the court: if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

NOTE: Amends cross-reference in accordance with the repeal and recreation of s. 802.05 by S. Ct. Order 03-06, which moves provisions relating to prisoner litigation from s. 802.05 (3) to s. 802.05 (4).

**Section 6.** 809.103 (2) (a) of the statutes is amended to read:

809.103 (2) (a) Is frivolous, as determined under s. ~~814.025 (3)~~ 802.05 (2).

NOTE: Amends cross-reference in accordance with the repeal and recreation of s. 802.05 by S. Ct. Order 03-06.

**Section 7.** 814.04 (intro.) of the statutes is amended to read:

814.04 (intro.) Except as provided in ss. 93.20, 100.30 (5m), 106.50 (6) (i) and (6m) (a), 115.80 (9), 281.36 (2) (b) 1., 767.33 (4) (d), 769.313, ~~814.025~~ 802.05, 814.245, 895.035 (4), 895.10 (3), 895.75 (3), 895.77 (2), 895.79 (3), 895.80 (3), 943.212 (2) (b), 943.245 (2) (d) and 943.51 (2) (b), when allowed costs shall be as follows:

NOTE: Amends cross-reference in accordance with the repeal and recreation of s. 802.05 by S. Ct. Order 03-06.

**Section 8.** 814.29 (3) (a) of the statutes is amended to read:

814.29 (3) (a) A request for leave to commence or defend an action, proceeding, writ of error or appeal without being required to pay fees or costs or to give security for costs constitutes consent of the affiant and counsel for the affiant that if the judgment is in favor of the affiant the court may order the opposing party to first pay the amount of unpaid fees and costs, including attorney fees under ss. 802.05, and 804.12 (1) (c) ~~and 814.025~~ and under 42 U.S.C. § 1988 and to pay the balance to the plaintiff.

NOTE: Amends cross-reference in accordance with the repeal of s. 814.025 and the repeal and recreation of s. 802.05 by S. Ct. Order 03-06.

IT IS ORDERED that notice of these amendments be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

JUSTICE PATIENCE DRAKE ROGGENSACK wrote a dissent to the order adopting rules petition 03-06, joined by Justices JON P. WILCOX and DAVID T. PROSSER. JUSTICE DAVID T. PROSSER also wrote a brief dissent to the order, joined by JUSTICE JON P. WILCOX. See 2005 WI 38, S. Ct. Order 03-06, filed March 31, 2005.

Therefore for the reasons set forth in those written dissents, JUSTICES WILCOX, PROSSER and ROGGENSACK dissent from this supplemental order as well.

Dated at Madison, Wisconsin, this 21st day of June, 2005.

BY THE COURT:

Cornelia G. Clark  
Clerk of Supreme Court